THE RULE OF LAW AND ENFORCEMENT OF CHINESE TORT LAW

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While the United States has always been dependent on the rule of law . . . China [traditionally] relied on the rule of men, the imperial court and the regional governors they appointed.

—Liel Leibovitz & Matthew Miller[1]

It is in the legal realm that we find many of the deepest weaknesses and greatest hopes for our age.

— Jeffrey D. Sachs[2]

I. COMMON CURRENCY

The term "Rule of Law" was once an abstruse legal concept used mainly by philosophers and jurists.[3] However, today the phrase is common currency employed by professionals and lay persons alike. Newspapers editorialize about what the Rule of Law requires.[4] Economists demand adherence to the Rule of Law as a condition for international loans.[5] Middle East protesters assert that disregard for the Rule of Law is just cause for toppling governments.[6] And volunteers in nongovernmental programs, such as those conducted by the American Bar Association,[7] the Open Society Institute,[8] and the

1. LIEL LEIBOVITZ & MATTHEW MILLER, FORTUNATE SONS: THE 120 CHINESE BOYS WHO CAME TO AMERICA, WENT TO SCHOOL, AND REVOLUTIONIZED AN ANCIENT CIVILIZATION 20 (2011).

2. Jeffrey D. Sachs, Galen L. Stone Professor of Int'l Trade, Havard Univ., Remarks at Yale Law School Alumi Weekend: Globalization and the Rule of Law (Oct. 16, 1998), *in* YALE LAW SCH. OCCASIONAL PAPERS (1998).

3. In this article, "Rule of Law" is capitalized to emphasize the idea that the term denotes an important and coherent concept—the same way "Due Process" and "Equal Protection" are sometimes capitalized.

4. *See, e.g.*, Editorial, *"Big Stick 306" and China's Contempt for the Law*, N.Y. TIMES, May 6, 2011, at A26, *available at* 2011 WLNR 8863788 (opining that "China can make no claim to seriousness about the rule of law until it guarantees the rights of lawyers to do their job.").

5. *See, e.g.*, *Economics and the Rule of Law: Order in the Jungle*, ECONOMIST, Mar. 15, 2008, at 12, *available at* 2008 WLNR 5068416 ("[T]he rule of law has become important in economics.").

6. *See, e.g.*, Editorial, *Syria Gets the Message*, TORONTO STAR, May 11, 2011, at A26, *available at* 2011 WLNR 9328819 (discussing protesters' demand for credible elections, accountability and the rule of law).

7. *See ABA Rule of Law Initiative*, AMERICAN BAR ASSOCIATION, http://apps.americanbar.org/rol/ (last visited May 11, 2011) (providing information

Salzburg-based Center for International Legal Studies,[9] fan out across the globe to build the Rule of Law.

Contemporary references to the Rule of Law are often rooted in high standards and great ideals. However, the modern widespread use of the term Rule of Law does not signal that the phrase has achieved a fixed and definite meaning. Indeed, those who invoke these words often seem to have very different understandings of what the words denote. In many instances, there is little effort to indicate whether the Rule of Law is synonymous with, akin to, or distinguishable from "constitutionalism,"[10] "equal protection,"[11]

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about the American Bar Association's initiatives to promote the Rule of Law abroad).

8. *See Call for Proposals: Equality and Justice Under the Rule of Law*, OPEN SOCIETY FOUNDATIONS (Dec. 16, 2009), http://www.soros.org/initiatives/women/news/equality-law-20091216; *see also* Vincent R. Johnson, *Building the Rule of Law Abroad*, SAN ANTONIO LAWYER, Mar.-Apr. 2007, 10, 10-11 (discussing work in Ukraine).

9. The Center for International Legal Studies, headquartered in Salzburg, Austria, arranges visiting professorship for lawyers with twenty or more years of experience at institutions in Eastern Europe and the former republics of the Soviet Union. *See Visiting Professorships for Senior Lawyers* CENTER FOR INTERNATIONAL LEGAL STUDIES, http://www.cils.org/2010/sl/index.php (last visited Sept. 6, 2011).

10. In a case reversing a conviction entered by a court in the Philippine Islands, Justice Day quoted the following presidential statement which, to a large extent, equated the Rule of Law with rights guaranteed by the American federal constitution:

> [T]here are certain great principles of government which have been made the basis of our governmental system, which we deem essential to the rule of law . . . . Upon every division and branch of the government of the Philippines, therefore, must be imposed these inviolable rules: "That no person shall be deprived of life, liberty, or property without due process of law; that private property shall not be taken for public use without just compensation; that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense; that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted; that no person shall be put twice in jeopardy for the same offense or be compelled, in any criminal case, to be a witness against himself; that the right to be secure against unreasonable searches and seizures shall not be violated; that neither slavery nor involuntary servitude shall exist except as a punishment for crime; that no bill of attainder or ex post facto law shall be passed; that no law shall be passed abridging the freedom of speech or of the press or of the rights of the people to peaceably assemble and petition the government for a redress of grievances; that no law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof, and that the free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever

natural law,[12] religious principles,[13] "democracy,"[14] or even human "decency."[15]

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be allowed.

Kepner v. U.S., 195 U.S. 100, 122-23 (1904); *see also* Craig M. Jacobs, Comment, *The Constitutionality of Collateral Post-Conviction Claims of Actual Innocence*, 42 ST. MARY'S L.J. 455, 466 (2011) (noting the relationship of the Rule of Law and American constitutional principles).

11. *Cf.* Beard v. Banks, 548 U.S. 521, 542 (2006) (Stevens, J., dissenting) ("By ratifying the Fourteenth Amendment, our society has made an unmistakable commitment to apply the rule of law in an evenhanded manner to all persons, even those who flagrantly violate their social and legal obligations.").

12. *Cf.* Ellis Washington, *Natural Law Considerations of Juvenile Law*, 32 WHITTIER L. REV. 57, 81-82 (2010) ("Natural law, with its presumptions of judgment, justice, and adherence to God's law, the Bible, and the rule of law, was replaced by the Progressive reformer's deified compassion.").

13. Professor Thomas L. Shaffer of Notre Dame has grappled with the problem of distinguishing the demands of God from the demands of law. Shaffer writes:

> [N]otice what has happened to Bracton's daring 13th century proposition, "Not under the king, but under God and the law." We learned that in law school in my day—in Latin. It is the sort of thing that gets carved over courthouse doors, God and the law having meant the same thing to those who built courthouses. But maybe Bracton meant to put God and the law in tension: God and the law—take your pick. Maybe he even meant to suggest a difference in results, in moral answers. If so, American lawyers abolished the tension. We conflate God and the law. We turn Bracton into American civil religion.

Thomas L. Shaffer, *Nuclear Weapons, Lethal Injection, and American Catholics: Faith Confronting American Civil Religion*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 7, 11 (2000). Elaborating on this theme, Shaffer explains:

> [T]here are . . . three perspectives, not two. The king is subject to what lawyers proclaim as "the rule of law" (in modern America an article of faith for civil religion); both the king and the law are subject to God; the law does not reliably express the will of God, although the law owes its existence and the respect of believers to God.

Id. at 11 n.18; *see also* Thomas L. Shaffer, *Should a Christian Lawyer Sign up for Simon's Practice of Justice?*, 51 STAN. L. REV. 903, 904 (1999) ("[B]iblical justice is not derived from 'the rule of law.'"); Thomas L. Shaffer, *Faith Tends to Subvert Legal Order*, 66 FORDHAM L. REV. 1089, 1093 (1998) ("The believers' church sought to follow Jesus by not being violent. That tended to subvert legal order . . . . They did not . . . oppose the law; their subversive effect was in not accepting the ideology of the law, the rule of law.").

14. *Cf.* Consolidate Version of the Treaty on European Union art. 2, Sep. 5, 2008, 2008 O.J. (C 115) 17 ("The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights . . . .").

15. *Cf.* Daniel Mahoney, *Conservative Liberalism or Liberal Conservatism?*, FIRST THINGS: MONTHLY J. RELIGION & PUB. LIFE, Mar. 1, 2011, at 6, *available at* 2011 WLNR 3547645 (opining that, in the twentieth-century, "many conservative-minded Christians rethought their intransigent opposition to liberalism . . . [and]

Uncertainty about the meaning of the term Rule of Law is compounded by the fact that the same words that often call for "best practices" in the administration of justice can also be invoked to camouflage a legal system's serious deficiencies. As Professor Brian Z. Tamanaha aptly remarked:

> Disagreement exists about what the rule of law means among casual users of the phrase, among government officials, and among theorists. The danger of this rampant uncertainty is that the rule of law may devolve into an empty phrase, so lacking in meaning that it can be proclaimed with impunity by malevolent governments.[16]

In his cross-cultural study of the history, politics, and theory of the Rule of Law, Tamanaha suggests that there are three important themes that are indispensable components of the Rule of Law. The first is the idea of "government limited by law."[17] The second is "formal legality."[18] And the third is a distinction calling for a "rule of law, not man."[19]

Tamanaha's observations are useful in not losing sight of essential content of the Rule of Law. However, in addressing the question of whether the new Chinese tort code measures up to the Rule of Law, or significantly advances the Chinese pursuit for the development of a legal system based on the Rule of Law,[20] this article will take a very different approach. The perspective will not be global and essential, but culturally based and nuanced. More specifically, the point of reference will be American, with relevant source material about the meaning of the Rule of Law drawn from published decisions of the United States Supreme Court.

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came to more fully appreciate that constitutionalism and the rule of law are the indispensable pediments of a free and decent society").

16. BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY 114 (2004).

17. *Id.* at 114-19.

18. *Id.* at 119-22.

19. *Id.* at 122-26.

20. Advancement of the Rule of Law has been a goal of China for many years. *See, e.g.*, Vincent R. Johnson, *Chinese Law and American Legal Education*, 31 ST. MARY'S L.J. 1, 3 n.4 (1999) ("The theme of law reform played a prominent role in the fiftieth anniversary celebration of the founding of the People's Republic of China. Fifty official slogans were released by the Communist Party to mark the occasion, including . . . 'Rule the country by law,' and 'build a socialist country that is ruled by law!'").

This heuristic is not rooted in any belief that American practices are the epitome of conformance with the Rule of Law, nor that Chinese institutions should be judged by American standards. Rather, this approach is founded on the simple idea that opinions of the United States Supreme Court offer a rich trove of source material which may provide insights into what the Rule of Law means in practice.

Discussions about the Rule of Law are often frustratingly vague, theoretical, and abstract. In contrast, the United States Supreme Court issues opinions only in actual cases and controversies.[21] The Court never provides advisory opinions. Thus, whatever the Court has said about the Rule of Law—no matter how lofty the Justices' rhetoric—is anchored in the facts of real cases arising from actual disputes involving adversarial parties. As a result, the pronouncements of the Justices may resonate with the lessons of "real world" experience. This may be an advantage and antidote to the kind of overly theoretical discussions that obfuscate the meaning of the Rule of Law.

There has been sufficient time for a rich understanding of the Rule of Law to emerge from decisions of the American high court. The Supreme Court of the United States has sat since 1790,[22] in war and peace, in prosperity and depression, under many presidents who were noble and some who were not. Whatever the Court has said about the Rule of Law is likely to reflect that multi-faceted complexity of legal experience spanning more than two centuries. The opinions of the Supreme Court, while binding only in the United States, continue to enjoy some measure of respect in other countries.[23]

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21. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (stating that relevant cases have established that the "irreducible constitutional minimum of standing" demands that the plaintiff must have suffered an "injury in fact," which means an invasion of a legally protected interest which is (a) "concrete and particularized" and (b) "actual or imminent," as opposed to "conjectural" or "hypothetical.").

22. *See, e.g.*, *The Court as an Institution*, SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/about/institution.aspx (last visited Sept. 6, 2011) ("The Supreme Court first assembled on February 1, 1790, in the Merchants Exchange Building in New York City—then the Nation's Capital. . . . The earliest sessions of the Court were devoted to organizational proceedings. The first cases reached the Supreme Court during its second year, and the Justices handed down their first opinion in 1792.").

23. *See* Adam Liptak, *U.S. Court Is Now Guiding Fewer Nations*, N.Y. TIMES, Sept. 17, 2008, http://www.nytimes.com/2008/09/18/us/18legal.html (providing

This is one reason why foreign dignitaries traveling to the United States quite regularly visit the United States Supreme Court[24] to be briefed on the Court's governmental role by a Justice or a Supreme Court Fellow.[25]

II. THE RULE OF LAW IN UNITED STATES SUPREME COURT PRECEDENT

The ideal of the Rule of Law has been mentioned so frequently in opinions of the United States Supreme Court, and in so many different contexts, that it is difficult to distill a comprehensive definition of the term.[26] This is particularly true because the Rule of

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numbers as to how often the court is cited in Canada and Australia, and noting that "American constitutional law has been cited and discussed in countless decisions of courts in Australia, Canada, Germany, India, Israel, Japan, New Zealand, South Africa, and elsewhere."); Claire L'Heureux-Dube, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 20 (1998) (noting the "worldwide influence of the U.S. Supreme Court" and opining that "[c]ases like *Miranda v. Arizona* and *Brown v. Board of Education* have had a large impact on the spirit and development of human rights protections worldwide.").

24. *See, e.g.*, WILLIAM H. REHNQUIST, C.J., 2001 YEAR-END REPORT ON THE FEDERAL JUDICIARY (Jan. 1, 2002), http://www.supremecourt.gov/publicinfo/year-end/2001year-endreport.aspx ("[During 2001] over 800 representatives from more than 40 foreign judicial systems formally visited the Supreme Court of the United States seeking information [about the American legal system].").

25. *See generally Supreme Court Fellows Program*, SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/fellows (last visited May 16, 2011) ("Since 1973, the Supreme Court Fellows Program has enabled exceptionally talented people to contribute to the work of the Supreme Court of the United States, the Federal Judicial Center, the Administrative Office of the United States Courts, and more recently the United States Sentencing Commission."); *Supreme Court Fellows Program*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/fellows/fellowships.html (last visited May 16, 2011) ("The fellow based at the Court participates in long-range projects as well as day-to-day administrative tasks, and . . . is responsible for briefing distinguished court visitors on the workings of the American judicial system and the Supreme Court of the United States."); Vincent R. Johnson, *Rehnquist, Innsbruck, and St. Mary's University*, 38 ST. MARY'S L.J. 1, 10-11 & n.38 (2006) (discussing the Supreme Court Fellows program and briefings for visiting foreign dignitaries).

26. As previously mentioned, I capitalize the term "Rule of Law" to emphasize the idea that the term denotes an important and coherent concept. References to the Rule of Law in United States Supreme Court decisions, however, are almost never capitalized. It is close to impossible to comprehensively survey references to the Rule of Law in United States Supreme Court decisions. This is true because, in Westlaw, a search for "rule of law"—delimited by quotation marks—also brings back results for "rules of law," thus, greatly expanding the search results. Westlaw reference librarians indicate that there is currently no way to avoid this. In addition, a search must be carefully restricted to avoid results involving such unhelpful

Law has often been invoked by Justices authoring dissenting or concurring opinions, rather than by Justices writing for the majority or for a unanimous court.

In some instances, invoking the Rule of Law seems to mean little more than that the Justice in question strongly disagreed with the decision or the reasoning of the Court.[27] Moreover, issues about the meaning of the term "Rule of Law" are almost never joined. It is the rare decision that contains more than one reference to the Rule of Law.[28] Rather, it is characteristic of decisions of the United States Supreme Court that an invocation of the Rule of Law by one Justice, or group of Justices, is not commented upon by other Justices.

Moreover, in some cases, Justices have argued that their colleagues have misunderstood the meaning of the Rule of Law. For example, in *United States v. United States Coin & Currency*,[29] Justice William J. Brennan, Jr., wrote:

> The dissent seeks to explain its view of this case on the ground that even after this Court has declared certain individual conduct beyond the power of government to prohibit, the government retains an "interest in maintaining the rule of law and in demonstrating that those who defy the law do not do so with impunity" by punishing those persons who engaged in constitutionally protected conduct before it was so declared by this Court. This argument, of course, has nothing whatever to do with the rule of law. It exalts merely the rule of judges by approving

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variations of the term as "applicable rule of law," "general rule of law," "a rule of law," "any rule of law," "better rule of law," "state rule of law," "new rule of law," "different rule of law," "no rule of law," "controlling rule of law," "erroneous rule of law," "fixed rule of law," "traditional rule of law," "new rule of law," "pre-existing rule of law," "the rule of law governing," "the rule of law applicable," and "rule of law which." It is not possible make the article "the" an indispensable requisite in a search for "the rule of law."

27. *See, e.g.*, United States v. Leon, 468 U.S. 897, 963 (1984) (Stevens, J., concurring and dissenting) ("Although it may appear that the Court's broad holding will serve the public interest in enforcing obedience to the rule of law, for my part, I remain firmly convinced that 'the preservation of order in our communities will be best ensured by adherence to established and respected procedures.'").

28. *But see* Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833 (1992) (containing numerous references).

29. 401 U.S. 715 (1971).

> punishment of an individual for the lèse-majesté of asserting a constitutional right before we said he had it.[30]

References to the Rule of Law have been more frequent in recent decades than in the earlier part of the United States Supreme Court's history. Yet, the references often seem rooted in a bygone era, a time when principles of natural law played a larger role in the Court's jurisprudence. Citations to the Rule of Law summon the authority of principles that are timeless and immutable. They also call into play concerns that resonate cross-culturally. Thus, it was not surprising when Justice John Paul Stevens, in *United States v. Alvarez-Machain*,[31] reminded his colleagues that their decision had implications for the Rule of Law beyond American borders. Justice Stevens wrote in dissent:

> As the Court observes at the outset of its opinion, there is reason to believe that respondent participated in an especially brutal murder of an American law enforcement agent. That fact, if true, may explain the Executive's intense interest in punishing respondent in our courts. Such an explanation, however, provides no justification for disregarding the Rule of Law that this Court has a duty to uphold. . . . Indeed, the desire for revenge exerts a kind of hydraulic pressure . . . before which even well settled principles of law will bend, but it is precisely at such moments that we should remember and be guided by our duty to render judgment evenly and dispassionately according to law . . . . The way that we perform that duty in a case of this kind sets an example that other tribunals in other countries are sure to emulate.
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> . . . [M]ost courts throughout the civilized world . . . will be deeply disturbed by the "monstrous" decision the Court announces today. For every nation that has an interest in preserving the Rule of Law is affected, directly or indirectly, by a decision of this character. As Thomas Paine warned, an "avidity to punish is

30. *Id.* at 727 (Brennan, J., concurring) (citation omitted) (quoting *id.* at 735 (White, J. dissenting)). Webster defines "Lèse majesté" as "a crime (as treason) committed against a sovereign power" or "an offense violating the dignity of a ruler as the representative of a sovereign power." *Lèse-majesté*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary (enter "lese majeste" in the search box.) (last visited Aug. 23, 2011).

31. 504 U.S. 655 (1992).

> always dangerous to liberty" because it leads a nation "to stretch, to misinterpret, and to misapply even the best of laws."[32]

Notwithstanding the difficulties of tracking the meaning of the term Rule of Law from piecemeal judicial references to that ideal, certain themes emerge from an examination of the opinions of the United States Supreme Court. The writing of the Justices suggest that the essence of the Rule of Law is transparency,[33] consistency,[34] equality of treatment,[35] official accountability,[36] citizen responsibility,[37] institutional respectability,[38] and respect for human dignity.[39]

A. Transparency

The Rule of Law requires transparency in the administration of justice, so that lawyers and others can exercise vigilance over the conduct of the courts.[40] In *Gannett Co., Inc. v. DePasquale*,[41] Justice Harry Blackmun wrote:

> It has been said that publicity "is the soul of justice." J. Bentham, A Treatise on Judicial Evidence 67 (1825). And in many ways it is: open judicial processes, especially in the criminal field, protect against judicial, prosecutorial, and police abuse; provide a means for citizens to obtain information about the criminal justice system and the performance of public officials; and safeguard the integrity of the courts. *Publicity is essential to the preservation of public confidence in the rule of law and in the operation of courts.* Only

32. *Id.* at 686-88 (Stevens, J., dissenting) (footnotes omitted) (citations omitted) (some internal quotation marks omitted).

33. *See infra* Part II(A).

34. *See infra* Part II(B).

35. *See infra* Part II(C).

36. *See infra* Part II(D).

37. *See infra* Part II(E).

38. *See infra* Part II(F).

39. *See infra* Part II(G).

40. *Cf.* Michael S. Ariens, *American Legal Ethics in an Age of Anxiety*, 40 ST. MARY'S L.J. 343, 344-45 (2008) ("The rule of law constrains lawgivers . . . . One of the external constraints is a watchful eye from those in the daily law business—lawyers.").

41. 443 U.S. 368, 391-93 (1979) (holding that citizens have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials and that any First and Fourteenth Amendment right of members of the press to attend a criminal trial was not violated by orders excluding members of public and press from a pretrial suppression hearing and temporarily denying access to the hearing transcript).

> in rare circumstances does this principle clash with the rights of the criminal defendant to a fair trial so as to justify exclusion.[42]

Justice Brennan made a similar argument in *Nebraska Press Association v. Stuart*[43] where he wrote:

> [F]ree and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.[44]

B. Consistency

The Rule of Law demands consistency and abhors arbitrariness. Thus, in *McCleskey v. Kemp*,[45] Justice Brennan wrote, "preventing the arbitrary administration of punishment is a basic ideal of any society that purports to be governed by the rule of law."[46] Or, as Justice Antonin Scalia more colorfully argued, in *McCreary County, Kentucky v. ACLU of Kentucky*,[47] "What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle."[48]

Reflecting the Rule of Law's concern with arbitrariness, Justice Brennan, in *McGautha v. California*,[49] stated:

> The question that petitioners present for our decision is whether the rule of law . . . is fundamentally inconsistent with capital sentencing procedures that are purposely constructed to allow the maximum possible variation from one case to the next, and provide

42. *Id.* at 448 (Blackmun, J., concurring in part and dissenting in part) (emphasis added).

43. 427 U.S. 539 (1976).

44. *Id.* at 587 (Brennan, J., concurring).

45. 481 U.S. 279 (1987).

46. *Id.* at 339 (Brennan, J., dissenting).

47. 545 U.S. 844 (2005).

48. *Id.* at 890-91 (Scalia, J., dissenting).

49. 402 U.S. 183 (1971).

> no mechanism to prevent that consciously maximized variation from reflecting merely random or arbitrary choice.[50]

Justice Brennan concluded that applicable legal principles required "procedures that both limit the possibility of merely arbitrary action and provide a record adequate to render meaningful the institution of federal judicial review."[51]

1. Stare Decisis

The Rule of Law's demand for consistency is reflected in the Anglo-American principle of stare decisis.[52] As Professor Gerald S. Reamey explained:

> Consistency is a necessary goal of any legal system that seeks legitimacy. Random and entirely ad hoc rulings quickly undermine the confidence of a people in their courts and are not likely to be tolerated. This notion of predictability is, in American courts, advanced by deference to precedent (or stare decisis), generally understood to mean that the previous opinions of a given court should be followed.[53]

Under the American legal system, the primacy of the stare decisis principle is beyond doubt. As Justices Sandra Day O'Connor, Anthony Kennedy, and David H. Souter asserted in their joint opinion for the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[54] "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable."[55] In *Patterson v. McLean Credit Union*,[56] Justice Kennedy wrote that "[t]he Court has said

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50. *Id.* at 248 (Brennan, J., dissenting).

51. *Id.* at 287 (Brennan, J., dissenting).

52. Stare decisis is defined as the "doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation." BLACK'S LAW DICTIONARY 1537 (9th ed. 2009).

53. Gerald S. Reamey, *Innovation or Renovation in Criminal Procedure: Is the World Moving Toward a New Model of Adjudication?*, 27 ARIZ. J. INT'L & COMP. L. 693, 704 (2010).

54. 505 U.S. 833 (1992).

55. *Id.* at 854. *See generally* Harris v. United States, 536 U.S. 545, 556-57 (2002) (Kennedy, J.) ("Stare decisis is not an 'inexorable command,' . . . but the doctrine is 'of fundamental importance to the rule of law.'" (quoting Welch v. Tex. Dept. of Highways & Public Transp., 483 U.S. 468, 494 (1987))).

56. 491 U.S. 164 (1989).

often and with great emphasis that *the doctrine of stare decisis is of fundamental importance to the rule of law*. . . . [W]e have held that any departure from the doctrine of stare decisis demands special justification."[57]

Stare decisis promotes continuity in a world of change, and this is important to the Rule of Law. According to Justice Byron White, in *Irwin v. Department of Veterans Affairs*,[58] "Stare decisis is 'of fundamental importance to the rule of law' because, among other things, it promotes stability and protects expectations."[59] Elaborating on this idea, Justice Stephen Breyer, in *CBOCS West, Inc. v. Humphries*,[60] explained "[p]rinciples of stare decisis . . . demand respect for precedent whether judicial methods of interpretation change or stay the same. Were that not so, those principles would fail to achieve the legal stability that they seek and upon which the rule of law depends."[61]

Sounding a similar note in a specific context, Justice Stevens argued in *FCC v. Fox TV Stations, Inc.*[62] that there should be a strong presumption that the Federal Communications Commission's initial expression of views also reflected the views of the Congress that

57. *Id.* at 172-73 (emphasis added) (citations omitted) (internal quotation marks omitted); *see also* Montejo v. Louisiana, 129 S. Ct. 2079, 2101 (2009) (Stevens, J. dissenting) (arguing that the overruling of an earlier decision not only rested on "a flawed doctrinal premise," but the "dubious benefits" it hoped to achieve were "far outweighed" by the damage it did to the rule of law); Arizona v. Fulminante, 499 U.S. 279, 295 (1991) ("Stare decisis is 'of fundamental importance to the rule of law . . . .'" (quoting Welch v. Tex. Dept. of Highways &Public Transp., 483 U.S. 468, 494(1987))); Solem v. Helm, 463 U.S. 277, 311-12 (1983) (Burger, C.J., dissenting) ("'[T]he doctrine of *stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law.'" (quoting City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 419-20 (1983))).

58. 498 U.S. 89 (1990).

59. *Id.* at 100 n.3 (1990) (White, J., concurring in part and concurring in the judgment) (citation omitted); *see also* Morrissey v. Brewer, 408 U.S. 471, 499 (1972) (Douglas, J., dissenting in part) ("The rule of law is important in the stability of society. Arbitrary actions in the revocation of paroles can only impede and impair the rehabilitative aspects of modern penology.").

60. 553 U.S. 442 (2008).

61. *Id.* at 457.

62. 129 S. Ct. 1800 (2009).

delegated authority to the Commission because, among other things, "the rule of law . . . [favors] stability over administrative whim."[63]

a. The Developing Fabric of the Law

There is sometimes a tension between fidelity to an earlier decision and fidelity to the developing fabric of the law. Thus, in *Arkansas Electric Co-operative Corp. v. Arkansas Public Service Commission*,[64] Justice Brennan explained why the rule of an earlier case would not be followed in these terms:

> [T]he principle of *stare decisis* counsels us, here as elsewhere, not lightly to set aside specific guidance of the sort we find in *Attleboro*. Nevertheless, the same respect for the rule of law that requires us to seek consistency over time also requires us, if with somewhat more caution and deliberation, to seek consistency in the interpretation of an area of law at any given time. Thus, in recent years, this Court has explicitly abandoned a series of formalistic distinctions . . . which once both defined and controlled various corners of Commerce Clause doctrine.
>
> . . . The difficulty of harmonizing *Attleboro* with modern Commerce Clause doctrine has been apparent for a long time, so much so that we expressed skepticism about its continuing soundness . . . . [W]e can see no strong reliance interests that would be threatened by our rejection today of the mechanical line drawn in *Attleboro*.[65]

Or, as Chief Justice John G. Roberts, Jr., explained in *Citizens United v. Federal Election Commission*:[66]

> [*S*]*tare decisis* is not an end in itself. It is instead "the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion." Its greatest purpose is to serve a constitutional ideal—the rule of law. It follows that in the unusual circumstance when fidelity to any particular precedent does more to damage this constitutional ideal

63. *Id.* at 1826 (Stevens, J., dissenting).

64. 461 U.S. 375 (1983).

65. *Id.* at 391-92 (discussing Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co., 273 U.S. 83 (1927)).

66. 130 S. Ct. 876 (2010).

> than to advance it, we must be more willing to depart from that precedent.[67]

b. Justifying Change

When an earlier holding is not followed,[68] the Rule of Law calls for that decision to be explained.[69] Thus, in *Welch v. Texas Department of Highways & Public Transportation*,[70] Justice Lewis F. Powell, Jr., stated: "The rule of law depends in large part on adherence to the doctrine of stare decisis. Indeed, the doctrine is 'a natural evolution from the very nature of our institutions.' It follows that 'any departure from the doctrine of stare decisis demands special justification.'"[71] Or, as Justice Scalia lamented in *Boumediene v. Bush*,[72] "It is a sad day for the rule of law when . . . an important constitutional precedent is discarded without an apologia, much less an apology."[73]

2. Objectivity, Neutral Principles, and Logical Consistency

The Rule of Law demands objectivity of judgment. Thus, in *First National City Bank v. Banco Nacional de Cuba*,[74] Justice Brennan asserted: "No less important than fair and equal treatment to individual litigants is the concern that decisions of our courts command respect as dispassionate opinions of principle. Nothing less will suffice for the rule of law."[75]

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67. *Id.* at 920-21 (Roberts, C.J., concurring) (citation omitted).

68. *See, e.g.*, Ring v. Arizona, 536 U.S. 584 (2002). In *Ring*, Justice Ginsburg wrote for the Court: "Although the doctrine of *stare decisis* is of fundamental importance to the rule of law[,] . . . [o]ur precedents are not sacrosanct. [W]e have overruled prior decisions where the necessity and propriety of doing so has been established. We are satisfied that this is such a case." *Id.* at 608 (alterations in original) (citations omitted) (internal quotation marks omitted).

69. *See Citizens United*, 130 S. Ct. at 938 (Stevens, J. dissenting) ("[If the principle of stare decisis] is to do any meaningful work in supporting the rule of law, it must at least demand a significant justification, beyond the preferences of five Justices, for overturning settled doctrine.").

70. 483 U.S. 468 (1987).

71. *Id.* at 478-79 (citation omitted).

72. 553 U.S. 723 (2008).

73. *Id.* at 842 (Scalia, J., dissenting).

74. 406 U.S. 759 (1972).

75. *Id.* at 793 (Brennan, J., dissenting).

In *TXO Production Corp. v. Alliance Resources Corp.*,[76] Justice O'Connor argued that "[i]nfluences such as caprice, passion, bias, and prejudice are antithetical to the rule of law."[77]

In *Harmelin v. Michigan*,[78] a case dealing with the constitutionality of mandatory prison sentences, Justice Kennedy explained that "the rule of law is imperiled by sentences imposed for no discernible reason other than the subjective reactions of the sentencing judge."[79] Echoing that same theme in *Maryland v. Wilson*,[80] a case involving a police officer's stopping of an automobile, Justice Kennedy further asserted that "[a]dherence to neutral principles is the very premise of the rule of law."[81]

Concerns about objectivity arise with regard to laypersons who play a role in the legal system. As Justice William H. Rehnquist wrote for the Court in *Lockhart v. McCree*,[82] jurors must "temporarily set aside their own beliefs in deference to the rule of law."[83] Applying that principle in *Buchanan v. Kentucky*,[84] a case raising issues related to the death penalty, Justice Blackmun explained on behalf of the Court that "[t]hose who indicate that they can set aside temporarily their personal beliefs in deference to the rule of law may serve as jurors."[85]

The Rule of Law implies a preference for logical decision making. Thus, Justice Scalia, in *Hein v. Freedom from Religion Foundation, Inc.*,[86] urged that "[i]f this Court is to decide cases by rule of law rather than show of hands, we must surrender to logic."[87] Elaborating on that point, he asserted that "[t]he rule of law is ill

76. 509 U.S. 443 (1993).

77. *Id.* at 475 (O'Connor, J., dissenting).

78. 501 U.S. 957 (1991).

79. *Id.* at 1007 (Kennedy, J., concurring in part and concurring the judgment).

80. 519 U.S. 408 (1997).

81. *Id.* at 423 (Kennedy, J., dissenting).

82. 476 U.S. 162 (1986).

83. *Id.* at 176; *see also* Uttecht v. Brown, 551 U.S. 1, 38 (2007) (Stevens, J., dissenting) (quoting *Lockhart*, 476 U.S. at 176).

84. 483 U.S. 402 (1987).

85. *Id.* at 416; *see also* Gray v. Mississippi, 481 U.S. 648, 658 (1987) (expressing a similar view and quoting *Lockhart*, 476 U.S. at 176).

86. 551 U.S. 587 (2007).

87. *Id.* at 618 (Scalia, J., concurring).

served by forcing lawyers and judges to make arguments that deaden the soul of the law, which is logic and reason."[88]

However, there are limits to the value of logical reasoning. In *N.L.R.B. v. International Brotherhood of Electrical Workers, Local 340*,[89] Justice Scalia complained that, "[a]pplied to an erroneous point of departure, the logical reasoning that is ordinarily the mechanism of judicial adherence to the rule of law perversely carrie[d] the Court further and further from the meaning of the statute."[90]

3. Correctness

The Rule of Law requires that the adjudicative process operate in a way that both minimizes the risk of errors and corrects serious mistakes. Reflecting this concern, Justice Blackmun dissented in *Barclay v. Florida*,[91] a death penalty case, arguing that:

> [W]hen a State chooses to impose capital punishment . . . it must be imposed by the rule of law . . . . [In this case, the] errors and missteps—intentional or otherwise—come close to making a mockery of the Florida statute and are too much for me to condone.[92]

The failure to correct errors in the legal process cannot easily be excused on grounds of convenience or efficiency. Thus, in *McMann v. Richardson*,[93] Justice Brennan, in dissent, found himself constrained to agree with the concurring judge in the Court of Appeals that:

> [It is] the rankest unfairness, and indeed a denigration of the rule of law, to recognize the infirmity of the pre-*Jackson v. Denno* procedure for challenging the legality of a confession in the case of prisoners who went to trial but to deny access to the judicial

88. *Id.* at 633 (Scalia, J., concurring).

89. 481 U.S. 573 (1987).

90. *Id.* at 598 (Scalia, J., concurring).

91. 463 U.S. 939 (1983), *overruled by* Payne v. Tennessee, 501 U.S. 808, 830 (1991).

92. *Id.* at 991 (Blackmun, J., dissenting).

93. 397 U.S. 759 (1970).

> process to those who improperly pleaded guilty merely because the state would have more difficulty in affording a new trial to them.[94]

The Rule of Law is advanced by correcting substantive errors in the law. In part, this means that unsound rules must be overruled. Thus, Justice Scalia argued, in *South Carolina v. Gathers*,[95] that "[w]e provide far greater reassurance of the rule of law by eliminating than by retaining" the precedent created by a recent case that was erroneously decided.[96] Addressing concerns that overruling precedent undermines the principle of stare decisis,[97] Justice Scalia reasoned that "[t]he freshness of error not only deprives it of the respect to which long-established practice is entitled, but also counsels that the opportunity of correction be seized at once, before state and federal laws and practices have been adjusted to embody it."[98]

a. Judicial Reviewability and Respect for Co-Equal Branches

The Rule of Law's concern with correctness favors judicial review of legally significant governmental decisions. For example, in *Federal Maritime Board v. Isbrandtsen Co.*,[99] Justice Felix Frankfurter, dissenting, explained that:

> [Decisions of administrative agencies] are subject to what may broadly be called the judicial Rule of Law. Appeal lies to courts to test whether an agency acted within its statutory bounds, on the basis of rational evidence supporting a reasoned conclusion, and ultimately satisfies the constitutional requirement of due process.[100]

However, under the American system of checks and balances, that interest favoring judicial review must be weighed against the principle demanding respect for the actions of co-equal branches.[101]

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94. *Id.* at 786 (Brennan, J., dissenting).

95. 490 U.S. 805 (1989).

96. *Id.* at 825 (Scalia, J., dissenting).

97. *See supra* Part (II)(B)(1) (discussing stare decisis).

98. *Gathers*, 490 U.S. at 824 (Scalia, J., dissenting).

99. 356 U.S. 481 (1958).

100. *Id.* at 520 (Frankfurter, J., dissenting).

101. *Cf.* VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 9 (4th ed. 2009) (noting that the shaping of American tort law has been influenced by the idea that "[c]ourts should accord due deference to co-equal branches of government.").

In *Heckler v. Chaney*,[102] the Supreme Court held that there is a presumption that an agency's decision to forgo enforcement actions are not reviewable.[103] Concurring in the judgment, Justice Thurgood Marshall argued that:

> Because this "presumption of unreviewability" is fundamentally at odds with rule-of-law principles firmly embedded in our jurisprudence . . . one can only hope that it will come to be understood as a relic of a particular factual setting in which the full implications of such a presumption were neither confronted nor understood.[104]

In *Weinberger v. Romero-Barcelo*,[105] the Supreme Court held that provisions of the Clean Water Act did not require the issuance of an injunction.[106] In dissent, Justice Stevens argued that:

> [T]he Court authorize[d] free-thinking federal judges . . . [to sit as a committee of review.] Instead of requiring adherence to carefully integrated statutory procedures that assign to nonjudicial decision makers the responsibilities for evaluating potential harm to our water supply as well as potential harm to our national security, the Court unnecessarily and casually substitutes the chancellor's clumsy foot for the rule of law.[107]

b. Correctness Versus Stare Decisis

There is obviously a tension between the principle of stare decisis and the judicial obligation to revisit and reform erroneous legal principles. Addressing this tension, Justices O'Connor, Kennedy, and Souter wrote, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[108] that:

> The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. . . . [N]o judicial system could do society's work if it eyed each issue afresh in every case that raised it. Indeed, the very concept of the rule of law

102. 470 U.S. 821 (1985).
103. *Id.* at 837.
104. *Id.* at 840 (Marshall, J., concurring).
105. 456 U.S. 305 (1982).
106. *Id.* at 314.
107. *Id.* at 335 (Stevens, J., dissenting).
108. 505 U.S. 833 (1992).

> underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed.[109]

Discussing related concerns, in *Citizens United v. Federal Election Commission*,[110] Chief Justice Roberts explained:

> To the extent that the Government's case for reaffirming . . . [an earlier decision] depends on radically reconceptualizing its reasoning, that argument is at odds with itself. Stare decisis is a doctrine of preservation, not transformation. It counsels deference to past mistakes, but provides no justification for making new ones. There is therefore no basis for the Court to give precedential sway to reasoning that it has never accepted, simply because that reasoning happens to support a conclusion reached on different grounds that have since been abandoned or discredited.
>
> Doing so would undermine the rule-of-law values that justify stare decisis in the first place. It would effectively license the Court to invent and adopt new principles of constitutional law solely for the purpose of rationalizing its past errors, without a proper analysis of whether those principles have merit on their own. This approach would allow the Court's past missteps tospawn future mistakes, undercutting the very rule-of-law values that stare decisis is designed to protect.[111]

C. Equality of Treatment

The rule of law requires equality of treatment. Thus, in *Smith v. United States*,[112] Justice William O. Douglas asserted, "all constitutional guarantees extend both to rich and poor alike, to those with notorious reputations, as well as to those who are models of upright citizenship. No regime under the rule of law could comport with constitutional standards that drew such distinctions."[113]

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109. *Id.* at 854 (citations omitted).
110. 130 S. Ct. 876 (2010).
111. *Id.* at 924 (Roberts, C.J., concurring).
112. 423 U.S. 1303 (1975).
113. *Id.* at 1307-08 (decision of Douglas, J., granting a temporary stay).

Amplifying this point, in *Codd v. Velger*,[114] Justice Stevens made clear that in a society that prizes the Rule of Law, "the guilty as well as the innocent are entitled to a fair trial."[115]

In *Alderman v. United States*,[116] a search-and-seizure case, Justice Abe Fortas argued that:

> [The Fourth Amendment] . . . grants the individual a personal right . . . to insist that the state utilize only lawful means of proceeding against him. And it is an assurance to all that the Government will exercise its formidable powers to arrest and to investigate only subject to the rule of law.[117]

1. Procedural Safeguards

In a court system, the goal of equal treatment necessitates the adoption of procedural safeguards. Reflecting the intertwined nature of these concepts, Justice Brennan, in *Richmond Newspapers, Inc. v. Virginia*,[118] wrote:

> For a civilization founded upon principles of ordered liberty to survive and flourish, its members must share the conviction that they are governed equitably. That necessity . . . mandates a system of justice that demonstrates the fairness of the law to our citizens. One major function of the trial, hedged with procedural protections and conducted with conspicuous respect for the rule of law, is to make that demonstration.[119]

In *Joint Anti-Fascist Refugee Committee v. McGrath*,[120] Justice Douglas remarked, "[i]t is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice."[121]

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114. 429 U.S. 624 (1977).

115. *Id.* at 632 (1977) (Stevens, J. dissenting) (quoting Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 179 (1951) (Douglas, J., concurring)).

116. 394 U.S. 165 (1969).

117. *Id.* at 206 (Fortas, J., concurring in part and dissenting in part).

118. 448 U.S. 555 (1980).

119. *Id.* at 594-95 (Brennan, J., concurring).

120. 341 U.S. 123 (1951).

121. *Id.* at 179 (Douglas, J., concurring); *see also* Wisconsin v. Constantineau,

2. Fair Notice

Notice of what the law requires is an essential aspect of the Rule of Law. Thus, in *Exxon Shipping Co. v. Baker*,[122] Justice Breyer wrote that "there is a need, grounded in the rule of law itself, to assure that punitive damages are awarded according to meaningful standards that will provide notice of how harshly certain acts will be punished and that will help to assure the uniform treatment of similarly situated persons."[123]

In *Sewell v. Georgia*,[124] the Supreme Court dismissed an appeal of a conviction under an allegedly vague obscenity statute dealing with sexual devices. Justice Brennan dissented, arguing that:

> It is . . . hard to imagine a more stark prima facie case of a "vague law [that] impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis." In a society where the rule of law is paramount, it simply will not do to allow persons, however ignoble their trade—or perhaps because their trade is ignoble—to be convicted of crimes solely because policemen and juries, encouraged by the State[,] can conjure up scenes of sexual stimulation in which devices play a major role.[125]

The demands of fair notice are especially great in the criminal context. In *Cheney v. United States District Court for the District of Columbia*,[126] Justice Kennedy wrote:

> The distinction . . . between criminal and civil proceedings is not just a matter of formalism. . . . [T]he need for information in the criminal context is much weightier because "our historic[al] commitment to the rule of law . . . is nowhere more profoundly

400 U.S. 433, 436 (1971) ("It is significant that most of the provisions of the Bill of Rights are procedural, for it is procedure that marks much of the difference between rule by law and rule by fiat."); McGarva v. United States, 406 U.S. 953, 954 (1972) (Douglas, J., dissenting) (quoting *Constantineau*, 400 U.S. at 436).

122. 554 U.S. 471 (2008).

123. *Id.* at 525 (Breyer, J., concurring in part and dissenting in part).

124. 435 U.S. 982 (1978).

125. *Id.* at 988 (Brennan, J., dissenting) (citations omitted).

126. 542 U.S. 367 (2004).

> manifest than in our view that the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer."[127]

3. The Right to be Heard

The right to be heard is an important procedural aspect of the Rule of Law. In *Kenyeres v. Ashcroft*,[128] Justice Kennedy explained:

> An opportunity to present one's meritorious grievances to a court supports the legitimacy and public acceptance of a statutory regime. It is particularly so in the immigration context, where seekers of asylum and refugees from persecution expect to be treated in accordance with the rule-of-law principles often absent in the countries they have escaped.[129]

Or, as Justice Kennedy put it in another case, *Romer v. Evans*,[130] "[c]entral both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance."[131]

Of course, access to official tribunals means little if rights are not backed by remedies. Thus, in *Alden v. Maine*,[132] Justice Souter lamented that "a constitutional structure that stints on enforcing federal rights out of an abundance of delicacy toward the States has substituted politesse in place of respect for the rule of law."[133]

4. Procedure and Predictability

The Rule of Law favors legal predictability. For example, *Lassiter v. Department of Social Services of Durham County, North*

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127. *Id.* at 384 (quoting United States v. Nixon, 418 U.S. 683, 708-09 (1974) (alteration in original)). In *Nixon*, the Court found that the "presumptive privilege" in favor of the confidentiality of Presidential conversations and correspondence has to be interpreted "in light of our historic commitment to the rule of law." *Nixon*, 418 U.S. at 708.

128. 538 U.S. 1301 (2003).

129. *Id.* at 1305 (Kennedy, J., sitting as circuit justice).

130. 517 U.S. 620 (1996).

131. *Id.* at 633.

132. 527 U.S. 706 (1999).

133. *Id.* at 803 (Souter, J., dissenting).

Carolina,[134] the Supreme Court held that, on the facts of the case, the failure to appoint counsel for indigent parents in a proceeding to terminate their parental status was not a violation of due process.[135] In dissent, Justice Blackmun argued that:

> Procedural norms . . . protect litigants against unpredictable and unchecked adverse governmental action. Through experience with decisions in varied situations over time, lessons emerge that reflect a general understanding as to what is minimally necessary to assure fair play. Such lessons are best expressed to have general application, which guarantees the predictability and uniformity that underlie our society's commitment to the rule of law. By endorsing, instead, a retrospective review of the trial record of each particular defendant parent, the Court today undermines the very rationale on which this concept of general fairness is based.[136]

5. Substantive Limitations

The right of individuals to fair and equal treatment may be furthered by the adoption of rule-based mechanisms. Thus, in *United States v. Winstar Corp.*,[137] a case addressing the scope of the sovereign acts doctrine,[138] Justice David Souter remarked that an earlier case's "criterion of 'public and general act' . . . reflect[ed] the traditional 'rule of law' assumption that generality in the terms by which the use of power is authorized will tend to guard against its misuse to burden or benefit the few unjustifiably."[139]

The Rule of Law's interest in preventing abuse of power by public officials may be furthered by the creation and enforcement of rules, which afford protection to individual property interests. Thus, in *Wyman v. James*,[140] Justice Douglas wrote:

> [A citizen's] social security retirement benefits are probably his most important resource. Should this, the most significant of his rights, be entitled to a quality of protection inferior to that afforded his other interests? It becomes the task of the rule of law to

134. 452 U.S. 18 (1981).
135. *Id.* at 31-33.
136. *Id.* at 50 (Blackmun, J., dissenting).
137. 518 U.S. 839 (1996).
138. *Id.* at 891-95.
139. *Id.* at 897.
140. 400 U.S. 309 (1971).

> surround this new "right" to retirement benefits with protections against arbitrary government action, with substantive and procedural safeguards that are as effective in context as the safeguards enjoyed by traditional rights of property in the best tradition of the older law.[141]

D. Official Accountability

The Rule of Law demands proper conduct on the part of governmental actors. As former Attorney General Ramsey Clark clearly put it, "[w]ithout honorable servants, the rule of law is lost."[142]

The goal of official accountability can be fostered by the articulation of high standards and by holding officials accountable for deficient conduct. In *Caperton v. A.T. Massey Coal Co., Inc.*,[143] the Court recently noted that judicial "codes of conduct serve to maintain the integrity of the judiciary and the rule of law."[144] In an earlier era, Justice Tom C. Clark saw a connection between the ethical conduct of judges and whether individual rights were protected by the rule of law. As described by one commentator:

> Clark placed the responsibility for protecting the defendant's constitutional rights on the individual judge: "[T]he ultimate guardian of individual rights is the rule of law and its most important aspect is an independent court system. The judge rules the royal authority to do justice; he is accountable to no one but God and his conscience . . . ." Clark placed his confidence in judges, and this confidence led him to impose upon them a standard of behavior stricter than that he imposed on police officers.[145]

Moreover, Supreme Court Justices have argued that at least some government officials have a responsibility not only to act properly, but also to promote the Rule of Law. For example, in *Communist*

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141. *Id.* at 334 (Douglas, J., dissenting).

142. Ramsey Clark, *Foreword* to MIMI S. GRONLUND, SUPREME COURT JUSTICE TOM C. CLARK: A LIFE OF SERVICE xiii (2009), *reviewed by* Vincent R. Johnson, Book Review, 56-DEC Fed. Law. 76 (2009).

143. 129 S. Ct. 2252 (2009).

144. *Id.* at 2266.

145. Mark Srere, Note, *Justice Tom C. Clark's Unconditional Approach to Individual Rights in the Courtroom*, 64 TEX. L. REV. 421, 441 (1985) (omission in original) (footnote omitted).

Party of Indiana v. Whitcomb,[146] Justice Powell noted that the "chief executive official of government [has a responsibility] to enforce the rule of law."[147]

In *Rumsfeld v. Padilla*,[148] a case arising from the events of 9-11,[149] Justice Stevens argued that "[e]ven more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law."[150] Justice Brennan, in *Perez v. Ledesma*,[151] noted that Professor Charles Alan Wright had written that "[t]he doctrine of *Ex parte Young* seems indispensable to the establishment of constitutional government and the rule of law."[152] *Ex parte Young*,[153] was an early twentieth century case holding that federal courts may entertain suits against State officials who act unconstitutionally, despite the State's sovereign immunity.[154]

In *Shalala v. Illinois Council on Long Term Care, Inc.*,[155] Justice Clarence Thomas suggested that the "longstanding canon that judicial review of executive action will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress"[156] is rooted, in part, in "rule of law considerations, embodied in the due process clause."[157]

146. 414 U.S. 441 (1974).

147. *Id.* at 452 n.3 (Powell, J., concurring).

148. 542 U.S. 426 (2004).

149. *Id.* at 430-32.

150. *Id.* at 465 (Stevens, J., dissenting).

151. 401 U.S. 82, 110 (1971).

152. *Id.* at 110 (Brennan, J., concurring in part and dissenting in part); *see also* Employees of Dep't. of Pub. Health & Welfare, Mo. v. Dep't. of Pub. Health & Welfare, Mo., 411 U.S. 279, 323 (1973) (Brennan, J., dissenting) (quoting CHARLES WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 186 (2d ed. 1970)).

153. 209 U.S. 123 (1908).

154. *Id.* at 159-60.

155. 529 U.S. 1, 44 (2000).

156. *Id.* at 43 (Thomas, J., dissenting) (citations omitted) (internal quotation marks omitted).

157. *Id.* at 44 (Thomas, J., dissenting) (quoting S. BREYER, R. STEWART, C. SUNSTEIN, & M. SPITZER, ADMINISTRATIVE LAW AND REGULATORY POLICY 832 (4th ed. 1999)).

Echoing a similar theme, Justice Souter remarked, in *Alden v. Maine*,[158] that:

> When the state judiciary enforces federal law against state officials, as the Supremacy Clause requires it to do, it is not turning against the State's executive any more than we turn against the Federal Executive when we apply federal law to the United States: it is simply upholding the rule of law.[159]

1. The Exclusionary Rule

In some instances, official accountability (and the Rule of Law) is promoted by excluding certain evidence from trial. Thus, in *Sherman v. United States*,[160] Justice Frankfurter urged that:

> [T]he federal courts have an obligation to set their face against enforcement of the law by lawless means or means that violate rationally vindicated standards of justice, and to refuse to sustain such methods by effectuating them. They do this in the exercise of a recognized jurisdiction to formulate and apply proper standards for the enforcement of the federal criminal law in the federal courts, an obligation that goes beyond the conviction of the particular defendant before the court. Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake.[161]

By insisting on lawful conduct by public officials, the Rule of Law deters improper practices. In *United States v. Mechanik*,[162] Justice Marshall explained:

> Respect for the rule of law demands that improperly procured indictments be quashed even after conviction, because "only by upsetting convictions so obtained can the ardor of prosecuting officials be kept within legal bounds and justice be secured; for in modern times all prosecution is in the hands of officials."[163]

158. 527 U.S. 706 (1999).

159. *Id.* at 801 n.34 (Souter, J., dissenting).

160. 356 U.S. 369 (1958).

161. *Id.* at 380 (Frankfurter, J., concurring) (citation omitted) (internal quotation marks omitted).

162. 475 U.S. 66 (1986).

163. *Id.* at 84 (Marshall, J., dissenting) (quoting United States v. Remington, 208

2. Judicial Independence

It is not surprising that American conceptions of the Rule of Law focus on the importance of judicial independence. No ideal has been more deeply associated with the American justice system.[164] As Chief Justice Rehnquist remarked:

> The uniquely American contribution [to the art of government] consisted of the idea of placing . . . guarantees [of individual rights] in a written constitution which would be enforceable by an independent judiciary. This idea that the rights guaranteed by the Constitution would be enforced by judges who were independent of the executive was something found in no other system of government at that time. It was a unique American contribution to the theory and practice of government.[165]

One of the reasons why the Rule of Law was betrayed during the Reign of Terror was that judges in the French courts, particularly the Revolutionary Tribunal of Paris, were in no sense independent.[166] On the one hand, the judicial decision-making was manipulated by other organs of government.[167] On the other hand, judges were not protected from retribution based on their official acts.[168] Thus, the judiciary was simply a weak pawn of abusive revolutionaries.

Adherence to the Rule of Law sometimes means that judges must vote in a way that disappoints the persons who have helped to advance their careers. For example, Justice Tom C. Clark's

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F.2d 567, 574 (2d Cir. 1953) (L. Hand, J., dissenting)).

164. *See, e.g.*, Vincent R. Johnson, *The Ethical Foundations of American Judicial Independence*, 29 FORDHAM URB. L.J. 1007, 1014 (2002) [hereinafter *Ethical Foundations*] ("It would be easy to read the entire Code of Judicial Conduct as an homage to the principle of judicial independence. Indeed, the first sentence of the preamble states: 'Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us.'").

165. Chief Justice William H. Rehnquist, Address at Northern Illinois School of Law (Oct. 20, 1988) (on file with author).

166. *See* Vincent Robert Johnson, *The French Declaration of the Rights of Man and of Citizens of 1789, the Reign of Terror, and the Revolutionary Tribunal of Paris*, 13 B.C. INT'L & COMP. L. REV. 1, 22 (1989) (discussing interference with judicial duties).

167. *See id.* at 24 (discussing how judges "fell into step" with the prosecutor, who was himself a puppet of the legislators).

168. *See id.* at 19 (discussing the "absence of immunity for . . . official acts" and "the prospect of prosecution for disloyalty").

passionate commitment to the Rule of Law caused him to, at various points, hurt, anger or alienate "nearly every person or group dear to him," including President Harry S. Truman.[169]

In *Republican Party of Minnesota v. White*,[170] Justice Stevens, quoting an elected judge, wrote:

> Dedication to the rule of law requires judges to rise above the political moment in making judicial decisions. What is so troubling about criticism of court rulings and individual judges based solely on political disagreement with the outcome is that it evidences a fundamentally misguided belief that the judicial branch should operate and be treated just like another constituency-driven political arm of government. Judges should not have "political constituencies." Rather, a judge's fidelity must be to enforcement of the rule of law regardless of perceived popular will.[171]

Picking up on that theme in the same case, Justice Ginsburg added:

> Unlike their counterparts in the political branches, judges are expected to refrain from catering to particular constituencies or committing themselves on controversial issues in advance of adversarial presentation. Their mission is to decide individual cases and controversies on individual records, neutrally applying legal principles, and, when necessary, standing up to what is generally supreme in a democracy: the popular will.
>
> A judiciary capable of performing this function, owing fidelity to no person or party, is a longstanding Anglo-American tradition, an essential bulwark of constitutional government, a constant guardian of the rule of law.[172]

3. *Official Immunity*

The Rule of Law's interest in official accountability is limited by

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169. *See* Clark, *supra* note 142, at xiii-xiv.

170. 536 U.S. 765 (2002).

171. *Id.* at 803 (Stevens, J., dissenting) (quoting De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILLAMETTE L. REV. 367, 387 (2002)) (internal quotation marks omitted).

172. *Id.* at 803-04 (Ginsburg, J., dissenting) (citations omitted) (internal quotation marks omitted).

concerns about protecting officials from fear of liability based on their performance of duties. Reflecting this concern, Justice O'Connor, in *Forrester v. White*,[173] wrote for the Court:

> When officials are threatened with personal liability for acts taken pursuant to their official duties, they may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct. In this way, exposing government officials to the same legal hazards faced by other citizens may detract from the rule of law instead of contributing to it.[174]

Regarding the proper balance between official accountability and official immunity, Justice O'Connor remarked that, "[a]ware of the salutary effects that the threat of liability can have . . . as well as the undeniable tension between official immunities and the ideal of the rule of law, this Court has been cautious in recognizing claims that government officials should be free of the obligation to answer for their acts in court."[175]

In *Pulliam v. Allen*,[176] Justice Powell addressed the relationship of judicial immunity to judicial independence. Dissenting from a decision that allowed injunctive relief against a magistrate who had engaged in an allegedly unconstitutional practice, Justice Powell explained:

> I see no principled reason why judicial immunity should bar suits for damages but not for prospective injunctive relief. The fundamental rationale for providing this protection to the judicial office—articulated in the English cases and repeated in decisions of this Court—applies equally to both types of asserted relief. The underlying principle, vital to the rule of law, is assurance of judicial detachment and independence.[177]

173. 484 U.S. 219 (1988).
174. *Id.* at 223.
175. *Id.* at 223-24.
176. 466 U.S. 522 (1984).
177. *Id.* at 557 (Powell, J., dissenting).

E. Citizen Responsibility

The Rule of Law demands that citizens, as well as governmental actors, be held accountable for their conduct. Consistent with this idea, Justice Souter, in *Seminole Tribe of Florida v. Florida*,[178] wrote, "[t]he cardinal principles of this common-law vision were parliamentary supremacy and the rule of law, conceived as the axiom that all members of society, government officials as well as private persons, are equally responsible to the law and . . . equally amenable to the jurisdiction of ordinary tribunals."[179]

Holding citizens accountable for the legal consequences of their actions is one reason why courts are reluctant to apply estoppel principles against the government. In *Heckler v. Community Health Services of Crawford County, Inc.*,[180] Justice Stevens wrote for the Court:

> When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant.[181]

Once fair procedures have been observed in adjudication, and sanctions imposed, the Rule of Law calls for those penalties to be administered. For example, in *Evans v. Bennett*,[182] then-Justice William H. Rehnquist wrote:

> [J]ust as the rule of law entitles a criminal defendant to be surrounded with all the protections which do surround him under our system prior to conviction and during trial and appellate review, the other side of that coin is that when the State has taken all the steps required by that rule of law, its will, as represented by

178. 517 U.S. 44 (1996).

179. *Id.* at 136 n.32 (Souter, J. dissenting) (omission in original) (internal quotation marks omitted).

180. 467 U.S. 51 (1984).

181. *Id.* at 60. *But see* New Hampshire v. Maine, 532 U.S. 742, 755 (2001) (finding, in a case involving a boundary-line dispute between Maine and New Hampshire, that "this is not a case where estoppel would compromise a governmental interest in enforcing the law.").

182. 440 U.S. 1301 (1979).

> the legislature which authorized the imposition of the death sentence, and the state courts which imposed it and upheld it, should be carried out.[183]

Enforcement of sanctions is not only consistent with the Rule of Law, it also influences public attitudes about what the law should be. For example, in *Coker v. Georgia*,[184] the United States Supreme Court held that imposition of a death sentence for rape of an adult woman violated the Eighth Amendment.[185] Chief Justice Burger argued in dissent that:

> It is difficult to believe that Georgia would long remain alone in punishing rape by death if [as the result of the constitutional allowance of that sanction] the next decade demonstrated a drastic reduction in its incidence of rape, an increased cooperation by rape victims in the apprehension and prosecution of rapists, and a greater confidence in the rule of law on the part of the populace.[186]

F. Institutional Respectability

Rule of Law demands that a legal system operate in a way that commands public respect. This is true because the success of a peaceful substitute for unlawful forms of dispute resolution depends upon the perceived legitimacy of the alternative.

The institutional respectability of a legal system may be advanced in many ways. For example, in *Batson v. Kentucky*,[187] Justice Powell asserted that "public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race."[188]

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183. *Id.* at 1303 (Rehnquist, J., sitting as Circuit Justice).

184. 433 U.S. 584 (1977).

185. *Id.* at 597.

186. *Id.* at 618 (Burger, C.J., dissenting).

187. 476 U.S. 79 (1986).

188. *Id.* at 99; *see also* Johnson v. California, 543 U.S. 499, 511 (2005) (quoting *Batson*'s language on the rule of law); Holland v. Illinois, 493 U.S. 474, 520 (1990) (Stevens, J., dissenting) ("[P]ublic respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race."). *See generally* Mikal C. Watts & Emily C. Jeffcott, *A Primer on Batson, Including Discussion of Johnson v. California, Miller-El v. Dretke, Rice v. Collins, & Snyder v. Louisiana*, 42 ST. MARY'S L.J. 337, 343 n.17

At a more systemic level, the Rule of Law demands that the administration of justice be carried out in a way that is consistent with the current state of the art in science, technology, and economics. When Justice Clark left the bench, he became the first director of the Federal Judicial Center, the think-tank created by President Lyndon B. Johnson to support the operation of the federal court system.[189] In undertaking that assignment, Justice Clark explained that unless supported by proper judicial research, coordination, and management, "the rule of law in this nation cannot endure."[190]

1. Fidelity to Earlier Decisions

Respect for the legal system is one reason why the principle of stare decisis, discussed earlier, is so important.[191] In declining to overrule an earlier decision (*Roe v. Wade*[192]), which recognized a woman's constitutional right to have an abortion, Justices O'Connor, Kennedy, and Souter explained in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[193] that:

> Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court's concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible.[194]

(2011) (discussing how Supreme Court decisions sought to change the jury selection process related to race).

189. *See* Vincent R. Johnson, *Justice Tom C. Clark's Legacy in the Field of Legal Ethics*, 29 J. LEGAL PROF. 33, 35 n.8 (2004-05) (discussing the founding of the Federal Judicial Center).

190. MIMI S. GRONLUND, SUPREME COURT JUSTICE TOM C. CLARK: A LIFE OF SERVICE 242 (2009).

191. *See supra* Part II(B)(1).

192. 410 U.S. 113 (1973).

193. 505 U.S. 833 (1992).

194. *Id.* at 868.

The trio's opinion concluded that:

> A decision to overrule *Roe's* essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of *Roe's* original decision . . . .[195]

2. Avoidance of Politics

Confidence in the courts—and in the Rule of Law—is endangered when judges appear to act politically. In *Bush v. Gore*,[196] the case which decided the disputed 2000 presidential election, Justice Breyer noted that confidence in the courts is "a vitally necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself."[197] Justice Stevens sounded a similar note, stating "[i]t is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law."[198] In dissent, he lamented, "[a]lthough we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."[199]

3. Unfair Attacks on the Judiciary

The Rule of Law depends in part on the character of those who hold judicial positions. Thus, Justice Kennedy believes "that, at home and abroad, the rule of law . . . [is] protected by enlightened individuals as much as by any identifiable approach to the law."[200]

Scurrilous attacks on the judiciary are inconsistent with the Rule of Law.[201] Reflecting this concern, Justice Frankfurter, in *In re*

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195. *Id.* at 869.

196. 531 U.S. 98 (2000).

197. *Id.* at 157-58 (Breyer, J., dissenting).

198. *Id.* at 128 (Stevens, J., dissenting).

199. *Id.* at 128-29 (Stevens, J., dissenting).

200. JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 327 (2007).

201. *Cf.* Hon. Susan Weber Wright, *In Defense of Judicial Independence*, 25

Sawyer,[202] wrote that the nation's highest court, as "the supreme tribunal charged with maintaining the rule of law, should be the last place in which . . . attacks on the fairness and integrity of a judge and the conduct of a trial should find constitutional sanction."[203]

G. Respect for Human Dignity

The Rule of Law demands respect for human dignity. Thus, there is an important moral aspect to the Rule of Law.[204] Justice Scalia has argued that the Rule of Law is rooted, at least in part, in religious traditions. Thus, in *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*,[205] he wrote:

> Members of this Court have themselves often detailed the degree to which religious belief pervaded the National Government during the founding era. . . . Federal, state, and local governments across the Nation have [displayed the Ten Commandments]. The Supreme Court Building itself includes depictions of Moses with the Ten Commandments in the Courtroom and on the east pediment of the building, and symbols of the Ten Commandments adorn the metal gates lining the north and south sides of the Courtroom as well as the doors leading into the Courtroom. Similar depictions of the Decalogue appear on public buildings and monuments throughout our Nation's Capital. The frequency of these displays testifies to the popular understanding that the Ten Commandments are a foundation of the rule of law, and a symbol of the role that religion played, and continues to play, in our system of government.[206]

The respect for human dignity that is mandated by the Rule of Law means that the innocence of a criminal defendant is important. As

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OKLA. CITY U. L. REV. 633, 635 (2000) ("A judge who is concerned that his or her rulings might affect his or her career is a judge who might lose focus on the most important of judicial duties: to maintain the rule of law.").

202. 360 U.S. 622 (1959).

203. *Id.* at 669 (Frankfurter, J., dissenting).

204. *Cf.* Blanchette v. Conn. Gen. Ins. Corps., 419 U.S. 102, 162 (1974) (Douglas, J., dissenting) (predicating his analysis of the Rail Act of January 2, 1874 on the assumption that "the rule of law under a moral order is the measure of our responsibility").

205. 545 U.S. 844 (2005).

206. *Id.* at 906-07 (Scalia, J. dissenting) (footnote omitted) (citations omitted) (internal quotation marks omitted).

Justice Kennedy explained in *Dretke v. Haley*,[207] treating innocence as "a mere technicality . . . would miss the point" because "[i]n a society devoted to the rule of law, the difference between violating or not violating a criminal statute cannot be shrugged aside as a minor detail."[208]

In *United States v. Verdugo-Urquidez*,[209] Justice Brennan explained:

> By respecting the rights of foreign nationals, we encourage other nations to respect the rights of our citizens. Moreover, as our Nation becomes increasingly concerned about the domestic effects of international crime, we cannot forget that the behavior of our law enforcement agents abroad sends a powerful message about the rule of law to individuals everywhere.[210]

However, Justice Scalia has argued that some notions of respect for human dignity are at odds with the rule of law. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[211] an abortion-rights case, the joint opinion by Justices O'Connor, Kennedy, and Souter, stated:

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.[212]

Responding to that idea, in *Lawrence v. Texas*,[213] a case which held that a statute making it a crime for two persons of the same sex to engage in consensual sexual conduct was unconstitutional,[214] Scalia

207. 541 U.S. 386 (2004).
208. *Id.* at 399-400 (Kennedy, J., dissenting).
209. 494 U.S. 259 (1990).
210. *Id.* at 285 (Brennan, J., dissenting).
211. 505 U.S. 833 (1992).
212. *Id.* at 851 (citation omitted).
213. 539 U.S. 558 (2003).
214. *Id.* at 578.

wrote, "I have never heard of a law that attempted to restrict one's 'right to define' certain concepts; and if the passage calls into question the government's power to regulate *actions based on* one's self-defined 'concept of existence, etc.,' it is the passage that ate the rule of law."[215]

H. Summary of the American Perspective

As the preceding sections demonstrate, the American concept of the Rule of Law is complex. As articulated by the United States Supreme Court in piecemeal fashion over the course of two centuries, the Rule of Law demands that a legal system:

- operate transparently[216] and consistently[217] based on neutral principles which manifest due concern for the correctness of decisions;
- provide fair notice of what the law requires[218] and treat all persons equally;[219]
- hold governmental actors[220] and private individuals[221] accountable for their misconduct; and
- merit public respect[222] through practices which manifest an essential respect for human dignity.[223]

III. ENFORCEMENT OF CHINESE TORT LAW

A. Tort Law of the People's Republic of China

In 2009, after many years of study and deliberation,[224] China

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215. *Id.* at 588 (Scalia, J., dissenting).
216. *See supra* Part II(A).
217. *See supra* Part II(B).
218. *See supra* Part II(C)(2).
219. *See supra* Part II(C).
220. *See supra* Part II(D).
221. *See supra* Part II(E).
222. *See supra* Part II(F).
223. *See supra* Part II(G).
224. *See* Zhang Lihong, *The Latest Developments in the Codification of Chinese Civil Law*, 83 TULANE L. REV. 999, 1024-37 (2009) (discussing the drafting of China's tort law); George W. Conk, *A New Tort Code Emerges in China*, 30 FORDHAM INT'L L.J. 935 (2007) (discussing an important draft).

adopted a new comprehensive tort law ("Tort Law"), which became effective July 1, 2010.[225] The Tort Law addresses a wide range of issues,[226] clarifying both the basic principles of tort liability[227] and the rules that apply to particular types of losses (such as premises liability,[228] products liability,[229] employer liability,[230] auto accidents,[231] medical malpractice,[232] environmental pollution,[233] ultrahazardous activities,[234] harm caused by animals,[235] and harm caused by objects (e.g. items falling from buildings or scattered in a road)).[236]

The Tort Law states a basic rule of liability based on fault,[237] but recognizes some forms of strict liability, as in the case of harm caused by aircraft,[238] high-speed rail transportation,[239] and nuclear accidents.[240] Interestingly, some provisions imposing (strict) liability allow the defendant to mitigate but not eliminate liability for damages by proving that care was exercised to avoid the infliction of harm. This reallocation of the burden of proof, which is highly unusual when viewed from an American perspective, applies to guardians of persons without civil conduct capacity (such as children).[241]

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225. Zhonghua Renmin Gongheguo Qinquan Zerenfa (中华人民共和国侵权责任法) [Tort Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective July 1, 2010) (Lawinfochina), *available at* 2009 China Law LEXIS 668.

226. *See generally* Helmut Koziol and Yan Zhu, *Background and Key Contents of the New Chinese Tort Liability Law*, 1 J. OF EUROPEAN TORT LAW 328 (2010) (offering a thoughtful and detailed survey of the new Chinese tort law).

227. *See* Tort Law of the People's Republic of China, ch. I ("General Provisions"), ch. II ("Constituting Liability and Methods of Assuming Liability").

228. *See id.* art. 37-40, 85-91.

229. *See id.* art. 36, 41-47.

230. *See id.* art. 34-35.

231. *See id.* art. 48-53.

232. *See id.* art. 54-64.

233. *See id.* art. 65-68.

234. *See id.* art. 69-77.

235. *See id.* art. 78-84.

236. *See id.* art. 85-91.

237. *See id.* art. 6.

238. *See id.* art. 71.

239. *See id.* art. 73.

240. *See id.* art. 70.

241. *See id.* art. 32.

The new Tort Law grapples with issues related to compensatory damages for personal injury[242] (including emotional distress[243]), property damage,[244] and wrongful death.[245] Punitive damages are allowed only in cases involving defective products.[246] Remedies include, among other alternatives, restitution for unjust enrichment,[247] injunctive relief,[248] and apology.[249]

Several provisions in the new Tort Law address issues related to apportionment of damages,[250] joint and several liability[251] and contribution among joint tortfeasors.[252] One article in the Tort Law allows for periodic payment of damages in cases where lump sum compensation would not be feasible.[253]

The Tort Law recognizes total or partial defenses based on comparative fault,[254] force majeure,[255] self-defense,[256] and necessity.[257] Other familiar concepts are reflected in provisions stating that property damages are to be measured by (fair) market value at the time of the tortious interference.[258]

Mental and physical impairment resulting from alcohol or drug use is, quite naturally, not a defense to liability. Somewhat more subtly, loss of consciousness *is not* a barrier to liability, *if* the

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242. *See id.* art. 16.
243. *See id.* art. 22.
244. *See id.* art. 19.
245. *See id.* art. 17-18.
246. *See id.* art. 47.
247. *See id.* art. 20 (allowing compensation according to the benefit obtained by the defendant, rather than measured by the loss to the plaintiff).
248. *See id.* art. 21 (stating that a victim may require a tortfeasor to assume liability, including by way of cessation of infringement); *see also id.* art. 15(1) (providing that tort liability may be assumed by a defendant via cessation of infringement).
249. *See id.* art. 15(7).
250. *See id.* art. 12.
251. *See id.* art. 8-10, 14.
252. *See id.* art. 14.
253. *See id.* art. 25.
254. *See id.* art. 26.
255. *See id.* art. 29.
256. *See id.* art. 30.
257. *See id.* art. 31.
258. *See id.* art. 19.

defendant was at fault for the accident (e.g. driving an automobile despite a history of seizures) *or* is able to pay compensation.[259]

The Tort Law supplements earlier legislation dealing with particular tort issues, such as the Revised Product Quality Law,[260] the Production Safety Law,[261] and the Road Traffic Safety Law.[262] To the extent that special legislation expressly adopts different standards for imposing tort liability in a specific context, those particular enactments preempt the general principles announced in the Tort Law.[263] Before the new Tort Law was enacted, liability-related provisions could be found in "more than 40 different pieces of legislation."[264] The new Tort Law's "integration with existing regulations, along with other vagaries, remains to be tested."[265] Moreover, it is clear that the new Tort Law relies upon concepts that have been articulated elsewhere. For example, the Tort law contains reasonably sophisticated causation rules dealing with multiple fault and alternative liability,[266] independently sufficient causation,[267] aiding and abetting,[268] and concerted action,[269] in terms that are remarkably similar to parallel rules in the United States.[270] However,

259. *See id.* art. 33.

260. Zhonghua Renmin Gongheguo Chanpin Zhiliangfa (中华人民共和国产品质量法) [Product Quality Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., July 7, 2000, effective Sept. 1, 2000) (Lawinfochina), *available at* http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383813.htm.

261. Zhonghua Renmin Gongheguo Anquan Shengchanfa (中华人民共和国安全生产法) [Production Safety Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2002, effective Nov. 1, 2002) (Lawinfochina), *available at* http://www.npc.gov.cn/englishnpc/Law/2007-12/06/content_1382127.htm.

262. Zhonghua Renmin Gongheguo Daolu Jiaotong Anquanfa (中华人民共和国道路交通安全法) [Road Traffic Safety Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2003, effective May 1, 2004) (Lawinfochina), *available at* http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471534.htm.

263. *See* Tort Law of the People's Republic of China, *supra* note 225, art. 5.

264. Peter Coles, *Tort Law Reform in the People's Republic of China*, MONDAQ, Jul. 8, 2010, *available at* 2010 WLNR 13661071.

265. Zou Weining & Ma Chunsheng, *Protecting the People*, CHINA LAW & PRACTICE, May 12, 2010, *available at* 2010 WLNR 11267808.

266. *See* Tort Law of the People's Republic of China, *supra* note 225, art. 3.

267. *See id.* art. 10.

268. *See id.* art. 9.

269. *See id.* art. 8.

270. *See* VINCENT R. JOHNSON, MASTERING TORTS: A STUDENT'S GUIDE TO THE LAW OF TORTS 116-18, 122-24 (4th ed. 2009) (discussing independently sufficient

the Tort Law does not articulate basic causation principles, such as a "but-for" rule of factual causation.[271]

The promulgation of the new Tort Law is a great step in China's development of a legal system based on the Rule of Law. China now stands at a point far advanced from where it stood only a few decades ago.[272] Considerable progress has been made in addressing the deficiencies of what one writer recently described as "China's underdeveloped tort regime."[273] Prior to the promulgation of the new law, "persons injured by dangerous products or situations . . . [were] largely . . . unable to use the courts to demand compensation or safer products and properties."[274] This was a serious deficiency in the Chinese legal system because, in modern China, persons suffer a wide range of product and activity related injuries, such as harm caused by radiation,[275] plastic surgery,[276] hotel fires,[277] transportation accidents,[278] and product defects.[279]

The American State Department's Consular Information Sheet for China suggests just how different things can be in China. In discussing highway accidents in China, the State Department informs potential travelers that:

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causation, multiple fault and alternative liability, aiding and abetting, and concerted action by agreement).

271. *Id.* at 115.

272. *See* Johnson, *supra* note 20, at 2 ("During the Chinese Cultural Revolution (1966-76), the law schools were closed, the legal profession was obliterated, and there was no adherence to a rule of law.").

273. Andrew J. Green, *Tort Reform with Chinese Characteristics: Towards a "Harmonious Society" in the People's Republic of China*, 10 SAN DIEGO INT'L L.J. 121, 122 (2008).

274. *Id.* at 123.

275. *See, e.g.*, Cui Zheng, *Negligence, Denial and a Family's Radiation Tragedy*, CAIXIN ONLINE (Apr. 7, 2011, 11:58), http://english.caing.com/2011-04-07/100245626.html.

276. *See, e.g.*, Key, *Female Star Dies in Plastic Surgery Accident*, CHINA HUSH (Nov. 26, 2010), http://www.chinahush.com/2010/11/26/female-star-dies-in-plastic-surgery-accident/.

277. *See, e.g.*, Wen Ya, *Seven Arrested for Negligence in Hotel Fire*, GLOBAL TIMES (May 4, 2011, 2:40), http://china.globaltimes.cn/society/2011-05/651184.html.

278. *See, e.g.*, An Baijie, *Subway Stampede Leaves 25 Injured*, GLOBAL TIMES (Dec. 15, 2010, 8:55), http://china.globaltimes.cn/society/2010-12/ 601741.html.

279. *See, e.g.*, Li Yao, *Toxic Scare Jumps Over the Straits*, CHINA DAILY, May 28, 2011, at 1 (discussing a cancer-producing plastic additive found in food and drink products imported from Taiwan).

> Even minor traffic accidents can become public dramas. In some instances bystanders have surrounded accident scenes and nominated themselves to be an ad hoc jury. The parties involved in an accident may offer money to the crowd in exchange for favorable consideration. If there are no injuries and damage is minimal, the parties often come to agreement on the spot. If no agreement is reached and the police are called, the police may mediate or conduct an on-site investigation requiring those involved to come to the police station to sign the statements. Unresolved disputes are handled by the courts. In cases where there are injuries, the driver whose vehicle is determined to have inflicted the injury will often be held at least partially liable for the injured person's medical costs regardless of actual responsibility for the accident.[280]

Until recently, no one in China had much to lose. During the period of real communism, life was organized around the work unit, the *dan wei*. The *dan wei* provided what comfort and support life offered: a job, a simple place to live, rudimentary medical care, basic education, and retirement subsistence.[281] Persons did not have cars, condominiums, substantial material possessions, or even the hope of accumulating wealth. In these circumstances, there was no pressing need for a tort system to allocate losses.

Today, however, the *dan wei* plays a greatly reduced role. In China, there is a prosperous emerging middle class and rich upper class. Mass marketed products and traffic accidents cause injuries, for which there is a need for compensation. China must now cope with the costs of accidents that are inevitably part of life in a developing market economy,[282] which in many respects is more

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280. *China Country Specific Travel Information*, TRAVEL.STATE.GOV, http://travel.state.gov/travel/cis_pa_tw/cis/cis_1089.html#traffic_safety (last visited Feb. 11, 2012).

281. *See* Vincent R. Johnson & Brian T. Bagley, *Fighting Epidemics with Information and Laws: The Case of SARS in China*, 24 PENN ST. INT'L L. REV. 157, 173 (2005) ("Under traditional communism, the dan wei (work unit) provided cradle-to-grave care to each Chinese citizen. It supplied housing, medical services, education, employment, and retirement income—the types of economic benefits that are often at issue in tort litigation in western countries. Consequently, there was traditionally little need for a tort system and little tort litigation.").

282. *See, e.g.*, David Barboza, *Shanghai Subway Accident Injures Hundreds*, N.Y. TIMES, Sept. 28, 2011, at A7, *available at* 2011 WLNR 19592179 (discussing injuries to 271 persons).

capitalist than communist. Thus, there was a clear need for a new, comprehensive tort regime.

One may disagree with some of the substantive choices that were made by the drafters of the Tort Law. For example, in contrast to the American Communications Decency Act,[283] which broadly insulates Internet service providers from tort liability based on content they do not originate,[284] Chinese law takes a very different path. Network service providers who know that a user is violating the rights of another person are jointly and severally liable for harm which could be avoided by reasonable remedial measures on the part of the provider.[285]

There are other notable differences between tort law in China and tort law in the United States. For example, in China, children under ten are generally not liable for their torts,[286] but their parents are strictly liable their children's conduct.[287] In contrast, in the United States, the common law rules (subject to important statutory variations[288]) are just the reverse. American children are liable for their tortious conduct;[289] parents are not liable for their children's misdeeds merely by reason of parentage.[290]

In addition to imposing liability based on fault, strict liability, and vicarious liability, the new Chinese Tort Law allows for what might

283. 47 U.S.C. § 230(c)(1) (2006).

284. *See* VINCENT R. JOHNSON, ADVANCED TORT LAW: A PROBLEM APPROACH 238-47 (2010) (discussing the American Communications Decency Act).

285. *See* Tort Law of the People's Republic of China, art. 36.

286. *See* Zhonghua Renmin Gongheguo Minfa Tongze (中华人民共和国民法通则) [The General Principles of Civil Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., April 12, 1986, effective Jan. 1, 1987), art. 12, (Lawinfochina), *available at* http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383941.htm ("A minor under the age of 10 shall be a person having no capacity for civil conduct and shall be represented in civil activities by his agent ad litem.").

287. *See* Tort Law of the People's Republic of China, *supra* note 225, art. 32.

288. *See* JOHNSON & GUNN, *supra* note 101, at 53-54 (discussing parental liability statutes).

289. *Id.* at 52-53 (discussing suits against minor children). *But see* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 10(b) (2010) (recommending a rule that "[a] child less than five years of age is incapable of negligence").

290. *See* JOHNSON & GUNN, *supra* note 101, at 53 (discussing parental liability at common law).

be defined as equitable liability.[291] Under this rule, it is possible that liability might rest on nothing more than the fact that the defendant has a "deep pocket" and can afford to pay damages in a case where neither the victims nor the defendant-actor was at fault. Indeed, variations of the "deep pocket" principle show up with surprising frequency in the Chinese Tort Law. For example, various Articles oblige insurance companies to pay compensation in motor vehicle cases,[292] aside from whatever rights the plaintiff may have against the vehicle's user or owner. Regardless of civil conduct capacity, persons are liable for the losses they cause *if they have property*.[293]

Americans might argue that a tort system like the one in China—where contingent fees are (strictly speaking) prohibited, where there are no provisions for aggregate litigation (e.g., class actions), where punitive damages have never been awarded, and where there is no independent judiciary[294]—provides little hope of affording the victims of accidents access to legal remedies for the injuries they suffer. Still, it is clear that the new law provides *an adequate doctrinal framework* for the development of a modern tort system that has the potential to deter unnecessary accidents and fairly distribute the losses that inevitably occur in a heavily populated, business-oriented contemporary society.

B. Entrenched Obstacles

Of course, the Rule of Law demands more than a coherent set of legal provisions set down on paper. Any country can have a grand code, but whether that country adheres to the Rule of Law depends upon the practices that animate the resolution of the disputes that are supposed to be governed by a law's substantive provisions.

As an instrument for building the Rule of Law, the new Chinese Tort Law faces many obstacles. Among these are China's deeply entrenched practice of guanxi and political pressures favoring business interests, as well as the lack of an independent judiciary or a tradition of transparency in dealing with issues related to accident compensation. These issues are discussed in the following sections.

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291. *See* Tort Law of the People's Republic of China, *supra* note 225, art. 24.
292. *See id.* art. 49-50, 53.
293. *See id.* art 32.
294. *See* Part III(B)(3).

1. Guanxi

The making of gifts and the rendering of favors can distort official decision making processes.[295] This is why Western countries have often adopted ethics codes containing detailed provisions that minimize the impact of such pernicious influences.[296] However, in China, cultural traditions are very different. Reciprocal favors based on personal relationships are an established way of doing business, whether in the private sector or the public arena. The cultivation and use of "connections" is both expected and respected. Thus, there are importance differences between the United States and China when it comes to gifts and favors.

> In China . . . the use of special connections and privileged relationships for the purpose of gaining an advantage or accomplishing results is often referred to as the use of "guanxi." . . . At its worst, guanxi is akin to corruption . . . [and] undermines adherence to the rule of law.
>
> Undoubtedly, the practice of cultivating and capitalizing on guanxi exists in some form in all societies. However, because guanxi is often equated with dishonesty or nepotism, many countries seek to limit the use of guanxi in governmental affairs through legislation. . . . [W]hat may be particular to the United States is the passion with which the American public believes that laws and law enforcement mechanisms should be employed to root out and minimize the role of guanxi in the public sector. Many Americans today expect that the law can, should, and will be used to ensure that a level playing field in public life exists by eliminating, insofar as possible, any unfair advantage that might be gained through the use of special connections to those who exercise the power of government.[297]

295. *See* Vincent R. Johnson, *Ethics in Government at the Local Level*, 36 SETON HALL L. REV. 713, 734-36 (2006) (discussing how gifts threaten the performance of duties by public officials and employees).

296. *Cf.* RICHARD W. PAINTER, GETTING THE GOVERNMENT AMERICA DESERVES: HOW ETHICS REFORM CAN MAKE A DIFFERENCE 10 (2010) (discussing ethics rules at the federal level).

297. Vincent R. Johnson, *America's Preoccupation with Ethics in Government*, 30 ST. MARY'S L.J. 717, 721-22 (1999) [hereinafter *America's Preoccupation*].

If tort claims in China are decided based on the personal relationships that exist between judges and litigants or their lawyers, rather than on the basis of neutral legal principles, the new Chinese Tort Law will do little to advance the Rule of Law. More specifically, for the new Tort Law to advance the Rule of Law in a country with more than 1.3 billion inhabitants, there must be procedures in place to institutionalize the practices that will tend to ensure equality of treatment. At a minimum, these procedures should prohibit the types of gifts to judges and other court officials that threaten to distort judicial decisions;[298] ban the kinds of ex parte communications that potentially give a party an unfair advantage;[299] and disqualify judges from presiding over litigation involving closely connected persons and entities.[300]

2. Pro-Business Bias

Problems relating to official corruption in China have been intertwined with judicial bias in favor of business-related defendants. As Andrew J. Green explained in a recent article:

> Enforcement . . . [of personal injury and safety laws] has been hampered by local protectionism and corruption. In particular, local government officials tend to favor industry over other priorities because their superiors evaluate them for promotion principally based on economic growth statistics. In addition, officials are often financially interested in local industry. This systemic corruption has resulted in dysfunctional local governance. In many cases in China, local government will not be favorably disposed to the injured victim.[301]

Addressing similar concerns, Professor Chenglin Liu has explained why such local protectionism imperils the safety of food imported from China to the United States.[302] Liu writes:

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298. *See Ethical Foundations*, *supra* note 164, at 1018-20 (discussing gifts).

299. *See id.* at 1014-17 (discussing ex parte communications in the judicial context); Vincent R. Johnson, *Corruption in Education: A Global Legal Challenge*, 48 SANTA CLARA L. REV. 1, 34-35 (2008) (discussing ex parte communications in the academic context).

300. *See Ethical Foundations*, *supra* note 164, at 1024-26 (discussing problematic relationships that threaten judicial independence).

301. Green, *supra* note 273, at 125.

302. *See* Chenglin Liu, *The Obstacles of Outsourcing Imported Food Safety to*

> [L]ocal protectionism originated from the economic reforms in the 1980s that set China on the path toward rapid economic growth. . . . During the decentralization process, local governments assumed the primary role of developing local economies. Government officials at each level are actually appointed by government officials at the next higher level, rather than elected by the local people. As a result, local officials became accountable only to the government officials directly above them.[303]

Pro-business bias is accompanied by, and perhaps has caused, a recent effort to resolve disputes by mediation, rather than judicial decision. Reflecting on this trend, some commentators have opined that nothing less than the legitimacy of the courts is at stake.[304] As Stanley Lubman has explained, "[t]he reason for the pressure to shift to mediation appears to be the concern that the Chinese judicial system cannot effectively use formal law in the face of local Party, government and commercial interests, even as economic development provokes an increasing number of disputes."[305]

3. Lack of Judicial Independence

China lacks both a tradition of, and dedication to, the principle of judicial independence.[306] Courts are viewed not as a separate branch of government with a duty to check and balance the actions of other branches, but rather as administrative agencies designed to carry out governmental policy. To the extent that this continues to be true, it will be difficult or impossible for China to meaningfully adhere to the Rule of Law.

China, 43 CORNELL INT'L L.J. 249, 305 (2010) (concluding that "regulatory power over food safety cannot be delegated.").

303. *Id.* at 290-91.

304. *See* Stanley Lubman, *Civil Litigation Being Quietly "Harmonized,"* WALL ST. J. CHINA REAL TIME REPORT, (May 31, 2011, 3:05 PM), http://blogs.wsj.com/chinarealtime/2011/05/31/civil-litigation-being-quietly-harmonized/ (discussing the views of Carl Minzner).

305. *Id.*

306. *But see* RANDALL PEERENBOOM ED., JUDICIAL INDEPENDENCE IN CHINA: LESSON FOR GLOBAL RULE OF LAW PROMOTION (2010) (offering a collection of nuanced perspectives on whether or not judicial independence is a meaningful part of the Chinese legal system).

Judicial independence cannot flourish unless judges and lawyers are held to high standards that protect both the consumers of legal services and the public interest. Yet, as Chenglin Liu notes, "China has the most serious corruption problems among industrialized nations, despite government efforts to punish corrupt officials."[307]

Whether the new Chinese Tort Law will advance the Rule of Law, and in particular the Rule of Law's call for equality of treatment,[308] depends as much on the ethical and legal standards of conduct that will guide the law's application by judges,[309] and the representation of clients by lawyers,[310] as on the new law's substantive provisions.

The problems posed by lack of judicial independence in China are sometimes compounded by official intimidation of lawyers and potential litigants. For example, when thousands of children were poisoned by melamine tainted milk, a former journalist who urged parents to sue was convicted and sent to jail for disrupting social harmony.[311] And when a high-speed train crashed near Wenzhou, lawyers were initially told not to accept cases arising from the accident in order to minimize bad publicity for the government.[312]

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307. *See* Liu, *supra* note 302, at 294.

308. *See supra* Part II(C) (discussing equality of treatment as an aspect of the Rule of Law).

309. *See America's Preoccupation*, *supra* note 297, at 725-28 (discussing rules governing the conduct of American judges that are "designed to restrict the influence of guanxi"); *see also Ethical Foundations*, *supra* note 164, at 1014-20, 1024-26 (discussing prohibitions against improper ex parte communications, gifts, and "certain problematic relationships" and the indispensable contribution they make to equality of treatment of those who come before the courts).

310. *See America's Preoccupation*, *supra* note 297, at 728-29 (discussing rules governing the conduct of American lawyers).

311. *See* Andrew Jacobs, *China Sentences Activist in Milk Scandal to Prison*, N.Y. TIMES, Nov. 10, 2010, *available at* http://www.nytimes.com/2010/11/11/world/asia/11beijing.html ("A former journalist who became the public face of a campaign seeking justice for children harmed by tainted dairy products was sentenced . . . to two and a half years in prison on charges that his efforts disrupted social harmony.").

312. *See* Vincent R. Johnson, Train *Wreck Serves as a Test for Chinese Law*, HOUS. CHRON., Aug. 7, 2011, http://www.chron.com/opinion/outlook/article/Train-wreck-serves-as-a-test-for-Chinese-law-2081496.php (discussing the realities of mass tort litigation in China).

4. Absence of Transparency

In the United States, the legal system works, and the Rule of Law prevails, in large measure, because the courts enjoy the confidence of the public. This is true because the public is able to scrutinize the judicial administration of justice due to the free flow of information about how cases are decided.

The transparency of the American legal system is due in great part to the protections afforded to free speech and free press by the First Amendment. The media report on every phase of the litigation process: filings, testimony, judgments, and appeals, not to mention legislative efforts to overturn judicial decisions or to change the law that will govern future cases. Judges who make bad decisions are routinely taken to task by scholars and other commentators, and criticism of the courts enjoys very broad immunity from legal liability. Only knowingly or recklessly false statements are subject to civil or criminal sanctions.

Legal issues, such as those related to poisonous food, or faulty construction, are routinely reported in the Chinese press. However, there is little transparency with regard to the operation of the legal system. As mentioned above, many disputes are forced into mediation. Opinions explaining how cases were decided are rarely published. And the ultimate resolution of disputes is often unclear. For example, in contrast to the transparency that surrounded the administration of the 9-11 compensation fund in the United States,[313] "the management mode of operation" and payouts made by the tainted milk scandal fund in China "have been a mystery."[314] Lack of judicial transparency is a great obstacle to advancement of the Rule of Law in China.

313. *See* KENNETH R. FEINBERG, WHAT IS A LIFE WORTH?: THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11 46-47 (2005) (discussing how transparency was achieved by the September 11, 2001 terrorist attack victims compensation program).

314. Emma Chen, *Melamine Compensation Fund Criticized for Lack of Transparency*, WANT CHINA TIMES, (June 9, 2011, 15:49), http://www.wantchinatimes.com/news-subclass-cnt.aspx?cid=1104&MainCatID=11&id=20110609000058 (discussing lack of transparency in the administration of a victim compensation fund intended to benefit 300,000 infants harmed by tainted milk formula).

IV. CONCLUSION

Each step leads to the next. This maxim is not a Chinese proverb, but it could be. And it is one that applies to any fair analysis of the current status of Chinese tort law.

China's promulgation of a new Tort Law is a significant development in the construction of a modern and effective legal system. The new code provides a comprehensive legal framework that sets the stage for progress. However, the majority of the work necessary to advance the Rule of Law in China, particularly as it relates to deterring accidents and compensating injuries, is yet to be done.

The content and reach of the new Tort Code, in many respects, manifests respect for human dignity by creating, at least on paper, a plausibly fair regime for apportioning the costs of accidents. However, as the earlier parts of this article suggest, the Rule of Law is concerned with much more than the substantive terms of legal provisions.

China must develop the institutional practices that will bring to fruition the promise of the new Tort Law. In part, this will entail the proper selection, retention, and protection of judges. In part, it will also depend on whether persons have access to the justice system, either through competent counsel or self-representation.

The next step in China's pursuit of a legal system based on the Rule of Law must be the even-handed enforcement of the rights recognized by the new Tort Law. Cases must be decided in a manner that earns the respect of the Chinese citizenry and, to some extent, the respect of other nations. To achieve that recognition, the Chinese legal system will have to function in a way that is transparent and consistent. The system must accord those who come before the courts equal treatment, provide remedies that manifest essential respect for human dignity, and hold persons who injure others accountable for their conduct.

The new Tort Law is a coherent and thoughtful document. However, the manner in which it is enforced will determine whether, in the field of personal injury and property damage, China measures up to the Rule of Law.